# Making Motions: The Embodiment of Law in Gesture

*Bernard J. Hibbitts*[*]

*The Introduction to this collection of essays likens the trajectory of human experience to driving on the highway. Driving, as an activity, is constricted (or, perhaps more accurately, constructed) by a variety of "texts" which not only help us get where we want to go, but protect us along the way. For lawyers, the most obvious of these texts is the Motor Vehicle Code, the written set of driving regulations formally approved and enforced by the State. Drivers, however, are very much aware that the text of the Motor Vehicle Code is not the only "text" of the road. As the Introduction points out, "text" is also to be found in highway markers, dividing lines, road signs and (most important for present purposes) the didactic bodily movements and gestures of persons we encounter along the way, be they state troopers or other drivers.*

*What is true of driving is in many ways true of law in general. It is easy to recognize the written text of law, but a fully-accurate and nuanced understanding of how the law actually works requires an appreciation of other texts in law's semiotic field. In this article the author focuses on one such "alternative" text, legal gesture, by which he means any purposive bodily motion (especially, but not exclusively, of the arms or hands) that by convention signifies a specific legal change, condition or relation. The body of the article groups the functions of legal gesture into eight distinguishable, but necessarily overlapping categories labeled "indicative," "ordinative," "evidentiary," "demonstrative," "communal," "mnemonic," "regulatory," and "psychological." With each category, the author reviews various specific functions which legal gesture has historically served and/or continues to serve in our own legal system. The author concludes by suggesting that far from being a primitive or naive modality inherently inferior to writing, legal gesture is a sophisticated and powerful medium possessing a unique capacity to foster community, concreteness and bodily empowerment. To the extent that these ends and values are deemed worthy in a postmodern era, it may be appropriate to reform law by literally re-membering it.*

---

* Associate Professor, University of Pittsburgh School of Law.

Author's Note: I would like to thank Jody Armour, Harry Flechtner, Charles Goodwin, and Adam Kendon for their thoughtful comments on a previous draft of this paper. I similarly appreciate the research assistance of Leah Schmulewitz and William Curley. Responsibility for any mistakes or errors of interpretation contained herein is, of course, entirely my own.



HeinOnline -- 6 J. Contemp. Legal Issues 51 1995

## I. THE BODY IN LAW'S TEXT

In contemporary America, the locus of legal meaning — law's "text," if you will — is habitually deemed to be the written word. To guarantee "a government of laws and not of men," Americans have vested ultimate legal authority in a written Constitution bolstered by innumerable volumes of printed precedents and statutes. To prevent fraud and promote certainty, American lawyers routinely recommend (and our legislatures often insist) that basic legal transactions such as wills, contracts, and conveyances be put in writing. Traditional legal doctrine demands that our courts construe legal instruments solely according to their written terms, disregarding any oral statements made by the parties before those written terms were set down (the "parol evidence" rule). Our law schools teach law students how to interpret legal literature and how to craft legal documents.[1] The very language of American law is replete with references to the written word that underline the latter's denotive fundamentality. Standard law is "black-letter" Careful or circumspect judges follow "the letter of the law." Law-enforcement officers may "throw the book" at a repeat offender. Every layman knows that the essence of any legal agreement is to be found in the "fine print."

We must acknowledge the central and constructive role of writing in law's contemporary text, but we must not give in to the literal limitations of that metaphor. In particular, we must not overlook unwritten forms of expression and experience that shape our understanding and appreciation of law in practice, if rarely in principle. Even in a society saturated by the written word, law lives in the speech of lawyers and clients, in the gestures of attorneys and witnesses, and in the multi-sensory "performances" of persons party to wills, marriages, and trials. It resides in the setting and structure of courthouses, the design and decoration of courtrooms, and the costume and accoutrements of judges. Notwithstanding our traditional inclination to ignore them, these and other "alternative" legal texts have always had presence and power. Today a number of legal scholars are taking them more seriously,[2] thanks in part to new audio and video

1. A Canadian legal scholar, working within a pedagogically-similar environment, has gone so far as to describe contemporary legal education as a form of "literacy training." DeCoste, 1990: 61. See also Lepow, 1992: 78 ("Lawyers see the world as what can be written down in documents.").

2. On spoken language in various legal settings, see, e.g., Conley et al., 1990; Ainsworth, 1993; Sarat et al., 1989; Gill, 1988. On contemporary legal performances, see, e.g., Ball, 1975: 81; Beyer, 1988. On the significance of gesture and body language in courtroom communication, see Barkai, 1990. On the role of architecture in shaping legal meaning, see Goodrich, 1988: 148-151; Jones, 1991. On the growing legal significance of audio-video "paratexts," see Collins et al., 1992.



HeinOnline -- 6 J. Contemp. Legal Issues 52 1995

technologies which have allowed alternative forms to be preserved and studied with unprecedented ease.[3]

Here, then, is an incipient "crisis of text" within American law — a growing appreciation that the traditional equation of legal text with writing is inadequate. What is at stake in this crisis, however, is more than just an equation. The disjuncture between narrow and broad conceptions of legal text complements and potentially incorporates many other basic discontinuities. Writing, for instance, has frequently been associated with (among other things) "reason," the "masculine," and elite power. On the other hand, non-written forms have frequently (and rather more pejoratively) been associated with emotion, the "feminine," and the masses.[4] In this context, resolving the law's crisis of text in favor of writing alone, or alternatively in favor of a multiplicity of forms that includes but is hardly limited to writing, promises to have profound philosophical, sociological, and political implications.[5]

In this Article, I would like to push our conception of law's text beyond its traditional inscripted bounds by focusing on gesture as a legal instrumentality — or, somewhat more succinctly, "legal gesture." By this I mean any purposive bodily motion (especially, but not exclusively, of the arms or hands) that by convention signifies a specific legal change, condition, or relation.[6] An example of a contemporary legal gesture is raising one's right hand close to the body to signify the taking of an oath; an historical example, drawn from medieval Europe, is passing a straw, twig, or clod of earth to another person to signify the conveyance of land.[7] My definition of legal gesture purposefully excludes from the

---

3. See, e.g., Birdwhistell, 1970: 50, ("[T]he movie camera, together with the slow-motion analyzer, makes possible observation and analysis of human social behavior which has hitherto been hidden from comparative analysis.").

4. On the cultural significance and psychological and social implications of written and non-written forms, see generally Goody, 1986; Olson, 1994; Ong, 1982.

5. On the implications of various communicative forms (and combinations of those forms) for understandings of law, see Collins et al., 1992; Hibbitts, 1992; Hibbitts, 1995; Katsh, 1989.

6. This definition is extrapolated from Adam Kendon's definition of "gesture" in general: "any distinct bodily action that is regarded as being directly involved in the process of deliberate utterance." Kendon, 1990: 53. Extrapolating from the general to the legal here is especially appropriate insofar as many legal gestures are particularized or elaborated forms of gestures used in extra-legal contexts (although it is frequently unclear whether general gestures have shaped legal ones or *vice versa*).

7. Some scholars prefer to label at least some legal gestures "legal acts." For instance, it has been suggested that the term "gesture" is inadequate as a descriptor of potentially complicated legal procedures that involve multiple physical movements and even multiple actors. See, e.g., Viberg, 1992:9. It has also been suggested that certain legal gestures (such as transferring the straw or twig referred to above) are "acts" because they have efficacious physical results. There is something to both of these points. I nonetheless intend to eschew the term "legal act" in this Article. In the first place, that term does not suggest corporeal physicality as unequivocally as does "legal gesture." In the second place, the physical efficaciousness of movements need not defeat their status as gestures so long as they retain symbolic significance beyond their physical outcomes; in other words, passing a straw or twig to another person may validly be considered a gesture insofar as it has an importance (which, as representing the conveyance of a larger property, it does) beyond the literal physical transfer of the object. In the third place, regarding gesture as necessarily "monologic" (i.e., performed by one party only) rather than potentially "dialogic" (i.e., performed by multiple parties interacting) is problematic.



HeinOnline -- 6 J. Contemp. Legal Issues 53 1995

scope of this paper the many ordinary gestures used by lawyers and other legal actors to express emotion or emphasis, but which lack an explicitly legal import.[8] Their study — however interesting and relevant to an understanding of legal process — may be left for another occasion.

I have several reasons for focusing on legal gesture above all other alternative texts of law. First among these is the stark and provocative phenomenological contrast that gesture presents to writing (considering the latter as an artifact, not an activity which itself might be characterized as gestural). Unlike writing, which derives most of its status, strength, and utility from being largely disembodied, gesture is inevitably and intimately embodied. In this capacity, it is personal where writing tends to be impersonal, social where writing tends to be private, contextual where writing tends to be decontextual, ephemeral where writing tends to be permanent, and dynamic where writing tends to be static. These and other differences promise to make the study of legal gesture especially liberating for members of a writing-oriented legal culture.

My second reason for focusing on legal gesture has to do with the long (if still under-appreciated) history of that form in Western jurisprudence. Mirroring the changing fortunes of gesture in Western culture,[9] legal gesture has been an integral part of the Western legal tradition for more than 5000 years. In Mesopotamian and early Mediterranean societies that had little or no experience with writing, gesture was a critical element in legal performances marking legal change and relation.[10] The extent of law's dependence on gesture seems to have declined in the increasingly literate environments of Hellenistic Greece and Imperial Rome,[11] but the form and its legal manifestations experienced a resurgence in the "Dark Ages" that followed the collapse of the Western Roman Empire.[12] Legal gesture went into abeyance again after the twelfth century "Revival of Learning,"[13] but its decline was gradual at first, becoming precipitous — albeit never terminal — only in the wake of the Protestant Reformation (with its Scripturally-animated aversion to image and ceremony),[14] the development of Cartesian philosophy (with its denigration of the body in favor of the mind),[15] and the spread of literacy through the mass of

---

Not only is it arbitrary (reflecting, perhaps, a contemporary Western emphasis in the individual as the appropriate unit of analysis), but arguably unhelpful in evaluating how gesture in general (and legal gesture in particular) actually works in society.

8. See generally Barkai, 1990; Craver, 1993.

9. On these changing fortunes, see generally Bremmer et al., 1991; Elias, 1978.

10. See generally Hibbitts, 1992; Malul, 1983; Sittl, 1890.

11. See, e.g., Meyer, 1988.

12. See generally Hibbitts, 1992; Huebner, 1918; Koziol, 1992; Le Goff, 1980; Levy, 1951; Schmitt, 1990; Tabuteau, 1988.

13. See, e.g., Major, 1987.

14. See generally Eire, 1986. One sixteenth century Protestant commentator characteristically observed: "Some foolishly imagine that praier is made either better or worse by the jesture of our bodyes." Quoted in Thomas, 1991: 6.

15. See generally Descartes, 1992 (Heffernan trans.).



HeinOnline -- 6 J. Contemp. Legal Issues 54 1995

European and American populations[16] (thanks largely to the development of the printing press).[17] Notwithstanding this relatively recent setback, the indisputedly lengthy and elaborate career of legal gesture in use makes it a prime candidate for extended examination.

My third and final reason for focusing on legal gesture has to do with the likelihood that in an age of video and computers, gesture in general will become a more prominent and more respected communicative form. The visual media of film and television have already laid the cultural groundwork for gesture's revival.[18] Challenging our Cartesian prejudices, Harvard psychologist Howard Gardner (1983: 205) has recently posited the existence of a "bodily-kinesthetic intelligence" of which gesture is but one manifestation.[19] Other psychologists have lately suggested that a growing number of American children use a so-called "McLanguage" which relies much more on gesture than does traditional English.[20] At the same time, many computer software and hardware designers are working on "gestural interfaces" (extending all the way to "virtual reality") that will eventually revolutionize the way we interact with both electronic machines and each other.[21] As a new generation more comfortable with gesture grows up and enters professional life, and as visual and computer technologies continue to progress and shape cultural experience and expectations, we may plausibly expect renewed interest in gesture as a legal instrumentality. Studying legal gesture now may help us to both understand and deal with the possible consequences of such a development.

The few studies of legal gesture that have been undertaken to this point have explored its prominence in various legal systems and cultural environments,[22] the significance of specific legal gestures in specific historic contexts,[23] and the depiction of legal gestures in particular

---

16. See generally Gilmore, 1989; Houston, 1988.

17. In practice, many legal gestures were demeaned and ridiculed before they were formally eliminated. In 1739, for instance, David Hume wrote: "In order to aid the imagination in conceiving the transference of property, we take the sensible object [e.g., a clod of earth] and actually transfer to the person, on whom we would bestow the property. The suppos'd resemblance of the actions, and the presence of this sensible delivery, deceive the mind, and make it fancy, that it conceives the mysterious transition of the property. . . . This is a kind of superstitious practice in civil laws, and in the laws of nature, resembling the Roman catholic superstitions in religion. . . ." Hume, 1888: 515.

18. See Carpenter, 1960: 170 ("[F]ilm and TV are aiding us in the recovery of gesture. . . ."); Featherstone, 1990: 179 ("[T]he new emphasis upon visual images [draws] attention to the appearance of the body, the clothing, demeanour and gesture.").

19. See also Berman, 1989: 109 (discussing "body literacy"); Damasio, 1994: xvi.

20. Healy, 1990: 102; see also Pittman, 1990. In this context it is interesting to note that posters promoting a current national campaign against youth violence feature not only the slogan "Squash it," but an accompanying gesture of a fist restrained by a cupped hand. Koman, 1994. See also Thomas, 1991: 9 ("The middle-class youth of western Europe and America have no apparent inhibitions about . . . gesticulating . . . or expressing their emotions in physical form.").

21. See generally Kurtenbach et al., 1990; Laurel, 1993: 155-158; Romanyshyn, 1994 (discussing the "gestural metaphysics" of cyberspace).

22. See, e.g., Chasson, 1847; Hibbitts, 1992; Kocher, 1992; Koziol, 1992; Malul, 1983; Viberg, 1992.

23. See, e.g., Major, 1987; Malul, 1987; Wright, 1986.



HeinOnline -- 6 J. Contemp. Legal Issues 55 1995

manuscripts or other specific physical settings.[24] To this point, however, no one has considered the general functions of legal gesture as a modality.[25] Granted, legal gesture has been and to some extent still is used to swear oaths, transfer land, make contracts, and accomplish other specific legal ends, but what general functions does it serve within legal systems? What does it do? Our erstwhile failure to ask these rather basic questions has, I suggest, led us to underestimate legal gesture's inherent power and potential (an underestimation revealed by our tendency to pre-emptively dismiss legal gesture as "primitive," "archaic," or "naive"). In an effort to remedy this situation, Section II of this Article outlines eight broad categories of function which legal gesture has historically served and, on occasion, still serves; it then describes specific functions that specific legal gestures serve or have served within each of those categories. Section III of this Article suggests how an appreciation of legal gesture's multiple capabilities can provide important new insights into gesture's survival on the margins of contemporary legal culture, into its checkered history, and even into its future as a legal instrumentality.

## II. THE FUNCTIONS OF LEGAL GESTURE

The many functions of legal gesture as a modality can be grouped into at least eight distinguishable but necessarily overlapping categories. Somewhat arbitrarily, I have labelled these categories "indicative," "ordinative," "evidentiary," "demonstrative," "communal," "mnemonic," "regulatory," and "psychological."[26] In this Section, I will consider these categories in turn, illustrating the multiple specific functions legal gesture can serve within each category by reference to individual legal gestures drawn from historical[27] or contemporary experience.[28] Given the many

---

24. Amira, 1902-26; Kocher, 1981; Letts, 1933; Melnikas, 1975.

25. The closest legal scholars have come to this has been examining the functions of "legal formalities." This literature is certainly helpful to the present investigation, but it is neither very nuanced nor altogether applicable (given especially that legal gesture is merely one formality among others).

26. This ordering is not meant to imply any priority among functional categories other than a rough progression from what I (again, somewhat arbitrarily) would consider more- to less-obvious. I should emphasize that just as legal gesture is related to gesture in general (see Kendon, 1990), these categories may be applicable to the use of gesture in extra-legal settings.

27. Referring to "historical" legal gestures inevitably presents a problem of evidence. Most of our knowledge of the legal gestures used in defunct societies is based on surviving iconographic records comprised of reliefs, paintings, and illuminated manuscripts. All these sources are problematic. In the first place, art in these forms "arrests movement and is therefore restricted in the gestures it can show unambiguously" (Gombrich, 1982: 68). One must also acknowledge the possibility that not all the legal gestures depicted in historical iconographic sources were actually used, some having been, perhaps, attempts on the part of artists to create a visual equivalent for unheard speech. At the same time, it is also possible that some gestures initially born of artistic convention eventually worked their way into legal practice.



HeinOnline -- 6 J. Contemp. Legal Issues 56 1995

gaps in the existing legal and psychological literatures on gesture, much of what I have to say here is necessarily impressionistic; I offer it as a starting-point for more research rather than as a definitive product.

### *A. Indicative Functions*

Legal gesture can perform a variety of "indicative" functions, i.e., functions by which (implicitly or explicitly) it indicates or identifies certain important aspects or elements of legal transactions.

Most basically, legal gesture is a physical and corporeal sign which can indicate that a legal change or relation is being effected.[29] Although admittedly ambiguous in isolation, its use in appropriate settings can resolve potential doubts about the legal meaning or enforceability of words or other actions. In contemporary courtrooms, for instance, raising one's right hand close to the body usually indicates that a binding oath is being sworn. In the Middle Ages, pointing one's index and middle fingers (as depicted on the eleventh century Bayeux Tapestry and the fourteenth century manuscripts of the German *Sachsenspiegel*) could similarly indicate an oath-swearing. Such legal gestures have historically served as a sort of semiotic shorthand, alerting people not only to the fact that something of legal consequence is happening, but also to the precise legal nature of that "something" (e.g., the swearing of an oath).[30]

More concretely, legal gesture can indicate the party or parties to a legal transaction. Consider, oath-taking again. In ancient Greece and Rome, an individual could physically identify himself as an oath-swearer by placing his hand on the altar of a god.[31] In our own society, oath-swearers identify themselves to others by, *inter alia*, placing one hand on a Bible and raising the other. Analogously, gestures can indicate the parties to bilateral or multilateral undertakings, contracts, or conveyances. For

---

28. Two points might be made here in passing. First, individual legal gestures do not necessarily fall into all of the functional categories embraced by legal gesture as a whole, nor do they necessarily perform all possible functions within any category they do fall into. Second, identification of any specific function of legal gesture is not meant to imply that that function is necessarily exclusive to gesture (as opposed to say speech, or writing) as a legal instrumentality.

29. In the general literature on legal formalities, this tends to be described as an "evidentiary" function. In this Article, however, I will be using the term "evidentiary" more specifically to describe those functions of legal gesture related to the showing of intent and feeling.

30. Here a general comment of the nineteenth century German jurist Rudolph von Jhering is especially illuminative:

> Form is for a legal transaction what the stamp is for a coin. Just as the stamp of the coin relieves us from the necessity of testing the metallic content and weight - in short, the value of the coin. . ., in the same way legal formalities relieve the judge of an inquiry whether a legal transaction was intended and — in case different forms are fixed for different legal transactions — which was intended.

Quoted in Fuller, 1941: 801.

31. Bauml et al., 1975: 152; Sittl, 1890: 142-43.



HeinOnline -- 6 J. Contemp. Legal Issues 57 1995

instance, in the ancient Roman marriage ceremony, the parties joining their right hands (*dextrarum junctio*) were bride and groom.[32] In early medieval Europe, the gestures of handing over and receiving a clod of earth marked parties as the grantor and grantee of land respectively, visibly distinguishing them from other persons present as witnesses or simple bystanders. Medieval legal gestures sometimes worked in the same indicative fashion when multiple parties surrendered rights to one party, or when one person transferred rights to multiple parties. Thus, in eleventh century Normandy, a husband, wife, and their two sons made a gift to a local church: a surviving charter records that "all equally in confirmation of the aforesaid gift, together holding one book [standing for the gift], placed [it] on the altar of St. Martin."[33]

Legal gesture can also indicate the witnesses guaranteeing a legal transaction or event. This indication of witnesses is often accomplished directly by gestures performed by the witnesses themselves. For example, according to the *Book of Leviticus*, the witnesses to a death sentence in ancient Hebrew culture were required to come up and place their hands on the head of the condemned individual. This act directly marked them as witnesses simultaneously seeing, hearing, and endorsing the condemnation.[34] Similarly, several early Anglo-Saxon land charters contain a formula usually mistranslated as "the witnesses and their signatures are recorded," but which actually means "the witnesses were sworn and their hands touched."[35] This formula suggests that after watching the gestures performed by the participants to a conveyance, the witnesses endorsed the conveyance by touching the charter recording it. In both these contexts, the witnesses arguably came into being *qua* witnesses as much (if not more) by the gestures they performed as by any declaration or writing down of names.

Less directly, legal gesture can indicate the witnesses to an action by unilateral motions which designate witnesses metaphorically. In ancient Israel, for instance, swearing with one's hand on the thigh or genitals appears to have been an invocation of ancestors to witness and, if

---

32. See generally Davies, 1985; Williams, 1958. A similar gesture is recorded in the Bible (*Tobit* 7:13) and later became a prominent feature of medieval matrimonial practice. Still figuring in contemporary Christian liturgy (see, e.g., the matrimonial directions of the 1977 Episcopalian Prayer Book), it may have encouraged the English expression "to ask for [her] hand in marriage" (although both the expression and the gesture seem ultimately to have been derived from the Roman concept of *manus*, whereby a woman was under the control of — literally, "in the hands of" — her father or husband). Boswell, 1994: 213.

33. Tabuteau, 1988: 120-121.

34. *Leviticus* 24:14. See generally Wright, 1986: 434-35 ("By [their gesture] the witnesses symbolically confirm their testimony to the community and also acknowledge their responsibility in the death of the criminal.").

35. Danet et al., 1992: 103. See also sec. 1.1 of the medieval Bavarian Laws: "If any free person wishes to give his property to a church . . . let him confirm this bestowal with his own hand through a charter [letter], and let him call six or more witnesses if he wishes. Let them place their hands on the letter, and let those whom he asks mark their names there." Rivers trans., 1977: 118.



HeinOnline -- 6 J. Contemp. Legal Issues 58 1995

necessary, to defend the oath.[36] In ancient Greece and Rome, the aforementioned gesture of placing one's hand on an altar indicated not only the party taking the oath, but also that one or more gods was being called on to witness it.[37] Even today, the raising of the right hand is a sort of calling on our own God as witness, towards whom one's hand is extended in indication and supplication.[38]

Finally, legal gesture can literally or metaphorically indicate the object of a legal transaction. Frequently, this object is another person. Thus, the aforementioned Hebrew witnesses' gesture of touching the head of a man marked him as the object of the condemnation. More positively, ancient Hebrew law gave testators an opportunity to gesturally designate their beneficiaries: the *Book of Genesis* records that Israel, the father of Joseph, designated Joseph's son Ephraim as his principal beneficiary by putting his right hand on Ephraim's head.[39] In Roman law, a party claiming a slave analogously indicated him as the object of his claim by touching the slave with a ceremonial rod, saying: "I claim this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him."[40] Alternatively, a legal gesture can indicate what, if not who, is the focus of legal activity.[41] In medieval conveyances, for instance, the gesture of transferring a straw or a clod of earth generally indicated that land was the object of transfer.[42] In thirteenth century England, a transfer "by the door and its hasp and key" similarly signified livery of seisin of a house.[43] More abstractly, the medieval practice of handing over a staff or a glove often indicated a transfer of power (e.g., to do violence) or a right (e.g., to hold land or some other thing) as specified by accompanying words.[44]

---

36. Malul, 1985: 198.
37. Bauml et al., 1975: 152.
38. Viberg, 1992: 24.
39. *Genesis* 48:15. Joseph, realizing what his father had done, objected: "And Joseph said to his father, 'Not so, my father; for this one is the first-born [i.e., more entitled]; put your right hand upon his head.'" *Genesis* 48:19. Compare Israel's gesture with that reported by the plaintiff in a Mesopotamian Nuzi lawsuit: "My father Huya was ill and he lay on (his) bed. And my father took my hand, and spoke to me thus: 'My other, older sons have taken wives, but you have not taken a wife. Therefore I am giving you Sulili-Ishtar as your wife.'" Quoted in Speiser, 1955: 252.
40. Gaius, 1946: 237 (de Zuleta trans.).
41. In the Middle Ages, however, not all gestures literally indicted their material or legal (as opposed to their human) objects. Thus in eleventh century Normandy, many legal gestures made on the occasion of gifts to churches employed books which had no clear relationship to the object of gift. Tabuteau, 1988: 127-28.
42. The objects by themselves marked nothing unless and until gestures were made. To the extent that the objects were physically preserved afterwards, they were supposed to prompt recollection of the gestures which had given them meaning in the first place. Thus, an English chronicler writing *circa* 1100 noted that a cup given to Durham Cathedral on the occasion of a gift of land "is preserved in the church and retains the memory of that deed forever." Clanchy, 1979: 24 (quoting Simon of Durham, *Symeonis Monachi Opera Omnia*). See also Fichtenau, 1991: 32.
43. Bracton, 1977: 125 (Thorne trans.).
44. Le Goff, 1980: 245.



HeinOnline -- 6 J. Contemp. Legal Issues 59 1995

### *B. Ordinative Functions*

Legal gesture has what might be termed "ordinative" functions insofar as it can order and organize both the deployment and the perception of legal meaning.

First of all, legal gesture can "highlight" important information, events, or relationships within a legal transaction or performance.[45] Highlighting frequently follows from indication. Highlighting nonetheless goes beyond indication by setting legal gesture in the context of legal performance as a whole; it focuses on how legal gesture's deployment emphasizes some aspects of a transaction and not others. In a conveyance, for instance, a legal gesture may not only indicate who is giving and receiving land, but may draw special attention to those facts. As a result of gestures, the identity of the parties is foregrounded vis-a-vis other (theoretically less important) aspects of the agreement (such as the duration of the estate created) which may be solely expressed in speech.

Second, legal gesture can frame or define a legal transaction by marking its beginning and end. It thereby divides legally-important words and behaviors from other words and behaviors, giving a physical focus to witnesses' attention and later recollection.[46] Homer described a framing use of legal gesture in the *Iliad*: at one point during the siege of Troy, the Greek warrior Achilles initiated an oath by grasping the staff that gave him power to speak before the assembled Greeks; at the end of his oath, he flung the staff on the ground.[47] Somewhat less dramatically, we frame our own oaths by raising and then lowering our right hands.

Third, legal gesture can punctuate a legal performance by dividing it into individual "bits" or "chunks" of legal information. Such punctuation makes legal information easier to understand by providing multiple moments within which words or other transactional developments may be simultaneously assimilated and anticipated. The relatively long and complicated medieval homage ceremony was thus punctuated by several gestures: the vassal knelt and folded his hands, the lord embraced the hands of the vassal, and the lord kissed the vassal.[48] Metaphorically and even literally in this context, legal gestures allowed participants and witnesses to catch their breath. Such gestures were effective as punctua-

---

45. "Highlighting" has recently been defined as making "specific phenomena in a complex perceptual field salient by marking them in some fashion." Goodwin, 1994: 606.

46. Tiersma, 1988: 3 (describing this in terms of a separation between the ordinary and the extraordinary).

47. *Iliad*: 1.233-36, 245.

48. See Le Goff, 1980: 239 (quoting Guillaume Durand's *Speculum Juris* (1271): "[H]e who does homage, on his knees, places his hands between the hands of his lord and does him homage; he promises on his honor, and the lord, in a reciprocal sign of faith gives him a kiss.").



HeinOnline -- 6 J. Contemp. Legal Issues 60 1995

tion because they were deployed neither too frequently nor too infrequently. Performed too frequently, they themselves would have overloaded the attention and memory of witnesses; performed not frequently enough, they would have lost most of their prosodic value. In the context of a large ceremony, punctuating legal gestures can also give participants important physical cues for the ceremony's further gestural and verbal elaboration.[49] In this respect, legal gestures are stimulants to thought which help to ensure that legal change is effected according to conventional norms.

### *C. Evidentiary Functions*

Legal gesture can serve two functions which may conveniently be described as "evidentiary" insofar as they evince key aspects of a gesturor's mental state.

To begin, legal gesture can evince "intent": the intellectual willingness to initiate or undertake a legal change or relation. Legal gesture interposes between legal statement and legal consequence a physical action that requires time, effort, and voluntariness. The prospective or actual expenditure of time and effort focuses attention on the legal commitment being undertaken and gives individuals further opportunity or occasion to reflect on its probable results;[50] the performance of a calculated legal gesture after the passage of time when words are spoken (or through a period of time during which words are spoken) suggests that a gesturor genuinely wishes to accomplish a conveyance, a sale, etc.[51] By the same token, of course, the prospect or the obligation of having to make a time- and effort-consuming legal gesture may restrain individuals from making commitments which are in fact unintended.[52] The status of legal gesture as a voluntary physical movement also makes legal gesture evidentiary of intent because it reduces (although it admittedly does not eliminate) the possibility that the gesturor is acting under some kind of external duress. In the context of these observations it is quite clear why in the Middle

---

49. Feyereisen et al., 1991: 85 ("[M]otor performance during the presentation of verbal material may enhance recall performance."). See also McNeil, 1992: 245 ("Gestures occur . . . because they are part of the speaker's ongoing thought process. Without them thought would be altered or incomplete.").

50. Here legal gesture might be said to serve a mental "channeling" function (not to be confused, however, with the regulatory "channeling" function).

51. Livy's description of a legal gesture supposedly performed by the Carthaginian general Hannibal in association with an offer to liberate all the slaves who had accompanied their masters on service in Italy with the Carthaginian army in the third century B.C.: "To prove the genuineness of these offers, taking a lamb in his left hand and a stone in his right, he prayed to Jupiter and the other gods that if he broke his word, they would serve him as he was about to serve the lamb — whereupon he crushed the animal's head with the stone. The gesture succeeded. . . ." Livy, 1965: 71 (de Selincourt trans.).

52. To this extent legal gesture, like other legal formalities, has a "cautionary" aspect. See also *infra*, "Regulatory Functions."



HeinOnline -- 6 J. Contemp. Legal Issues 61 1995

Ages — consistent with then-prevailing theories of gesture in general[53] — gestures of homage were deemed to evince intent to be bound to one's feudal lord. They were time-consuming, effort-consuming, and demanded voluntary action on the part of the prospective vassal.[54]

Second, legal gesture can evince feeling, i.e., the emotions which accompany or are occasioned by a legal change or relation.[55] Legal transactions are "liminal" events — events that involve transitions from one social state or condition to another.[56] A person is independent, and then is dependent (vassalage); a person is separate, and then one is connected (contract; marriage); one is a possessor, and then one is not (conveyance). Liminal events are frequently occasions for the experience of strong emotions. If an individual is not able to physically show those emotions through, say, the making of a gesture, he may feel disconnected or vaguely disassociated from legal change. It may not be fully real to him or to others and therefore, perhaps, not fully compelling. On the other hand, performing a gesture may provide a legal actor with a critical catharsis, an opportunity to release and display emotions attendant upon change or relation in a way that consolidates that change and relation and supports its working. Returning to the example of the medieval homage ceremony, the gestures of kneeling and folding one's hands provided the gesturor not only with an opportunity to evince conscious intent to become the lord's man, but also an opportunity to show before his lord and others the humility with which he took up his new status. This display of humility in turn became a personal and social resource which helped sustain the feudal relationship into the future.

### *D. Demonstrative Functions*

Legal gesture can perform at least two "demonstrative" functions. These differ from indicative functions insofar as they involve analogic or symbolic showings or depictions of legal change or relation, and not merely significations of specific elements or aspects;[57] they differ from

---

53. See, for instance, Peter the Chanter's statement: "The gesture of the body is an argument and proof of the devotion of the mind." Quoted in Koziol, 1992: 60.

54. The capacity of this and other gestures for evidencing intent was in fact deemed so great that early medieval law frequently collapsed intent into action, assuming the former from the latter (a tendency which some scholars have mistaken for a medieval disregard of intent). See generally Mueller, 1955; Rosen, 1985: 52; Sayre, 1932.

55. The emotional capacity of gesture in general has been recognized for a long time. In the early Middle Ages, the Carolingian scholar Alcuin observed that by kneeling for worship Christians "show forth our humbleness of heart." Quoted in "Genuflexion" in *6 Catholic Encyclopedia*, 1908: 423.

56. On liminality generally, see Gennep, 1960.

57. See Kendon, 1985: 226 ("Gesture . . . comes in handy because being the kind of expressive medium that it is, it allows for the possibility of representing aspects of experience that can be represented in words at best only indirectly and in some respects not at all. It is impossible to display the appearance of action except by some form of action, for example. The representation of spatial



HeinOnline -- 6 J. Contemp. Legal Issues 62 1995

evidentiary functions insofar as they display "objective" rather than "subjective" dimensions of legal transactions. In execution, each demonstrative function of legal gesture can clarify the meaning and significance of legal information provided by other modalities (speech and even, theoretically, writing).[58] Collectively, the demonstrative capacities of legal gesture make it easier for gesturors and witnesses alike to understand the effect or implications of legal transactions. Such understanding may propel legal change by confirming individuals in their consent or their choices, or may alternatively prevent it by prospectively presenting individuals with an image depicting the otherwise undesired legal or physical effects of an inclination or declaration.

First, legal gesture can physically demonstrate the nature or effect of a legal agreement or relation. In ancient Mesopotamian law, for instance, a debtor's gesture of handing his garment (or the hem of his garment) to a creditor as part of a loan agreement demonstrated that the debtor — represented by the garment which had literally assumed his shape when worn — was coming under the creditor's legal and even physical power.[59] This demonstration may have been accompanied by a verbal explanation of what was going on, but the gestures (perhaps intentionally — see *infra*, "Mnemonic Functions") made the speech somewhat redundant. In the same legal culture, washing one's hands in an appropriate physical and verbal context demonstrated a giving up (a "cleansing" or literal "dissolving") of one's contractual obligations.[60] In ancient Greece, throwing iron bars into the sea after taking an oath (e.g., of alliance) demonstrated that the oath could not be revoked (insofar as the bars could not be retrieved).[61] In Imperial Rome, the joining of right hands demonstrated the achievement of peace and harmony between bride and groom.[62] In the Middle Ages, the prospective vassal's placement of his hands together before his lord ("commendation") in the conventional medieval homage ceremony demonstrated that he was legally bound, or

---

arrangements cannot be accomplished directly in words, but by moving the hands of the body about in space it is possible to demonstrate them.").

58. On the clarificatory capacity of gesture generally, see Kellerman, 1992: 241. One study reported by Kellerman involved subjects guessing an object from descriptions communicated by: (1) sound alone; (2) sound and facial expressions; and (3) sound and physiographic gestures denoting size, shape or movement. The subjects performed best under the third set of conditions, in which gestures had been used.

59. Viberg, 1992: 134. Compare the Hittite Laws, in which the severing of ties between parent and child involved a mother removing her son's robe, demonstrating the withdrawal of familial protection. Kruger, 1988: 113.

60. Kilmer, 1974: 180-82. This gesture resonates with the well-known gesture of Pontius Pilate, the first century Roman governor of Judea, demonstrating his renunciation of responsibility for the death of Jesus. See *Matthew* 27:24: "Pilate . . . took water and washed his hands before the crowd saying, 'I am innocent of this man's blood; see to it yourselves.'"

61. Steiner, 1994: 68.

62. Boswell, 1994: 51.



HeinOnline -- 6 J. Contemp. Legal Issues 63 1995

was at least ready to be bound.[63] The lord's placement of his hands over the hands of the vassal in turn demonstrated the lord's assumption of dominance within the feudal relationship being created between them. The same reality was gesturally demonstrated in German feudal law by having the lord step on the vassal's foot.[64]

Second, legal gesture can demonstrate the sanction supporting a legal transaction or relation — the price to be paid if a contract is not upheld or a conveyance is not accepted. This *in terrorem* function of legal gesture seems to have been particularly popular in ancient law. Homer's *Iliad* suggests that in ancient Greece, a mutual oath could be concluded by two parties taking wine from bowls and pouring it out on the ground. In the epic itself, the acts were accompanied by the explicatory words, "Whichever of the two [sides] should first do harm against the oaths, may their brains be poured onto the ground just as this wine."[65] The Roman historian Livy likewise reports that a Roman official concluded an early treaty between the Romans and the Albans with these words: "If [the Roman people] should by public consent and fraudulently depart from [the terms of the treaty], then, do you, Jupiter, so strike the Roman people as I strike this pig this day; strike so much the more as your power and strength are greater." At this point, according to Livy, the official "struck the pig with a flint knife."[66] Graphically concretizing penalties in this fashion drove home their meaning, and in the process provided a powerful incentive for parties to adhere to legal obligations.[67]

---

63. Gombrich, 1982: 71.

64. Bauml et al., 1975: 112-113. Compare the ancient Mesopotamian (Nuzi) practice of conveying land, wherein the seller removed his foot from the land and placed the foot of the buyer in its place, thereby demonstrating a change in control. Viberg, 1992: 161.

65. *Iliad*: 19.299-300.

66. Quoted in Watson, 1993: 33. Compare a treaty ceremony between the Romans and Carthaginians (279 B.C.) described by Polybius: "[T]he oath by Juppiter [sic] Lappis is as follows. The man who is swearing to the treaty takes in his hand a stone, and when he has sworn in the name of the state, he says 'If I abide by this my oath may all good be mine, but if I do otherwise in thought or act, let all other men dwell safe in their own countries under their own laws and in possession of their own substance, temples and tombs, and may I alone be cast forth, even as this stone', and so saying he throws the stone from his hand." Ibid. at 44.

67. By this stage in my analysis the careful reader will have noted that while I have acknowledged the various "indicative," "evidentiary," and "demonstrative" functions of legal gesture, I have stopped short of suggesting that legal gesture is "performative," i.e., that it can actually accomplish (as opposed to merely mark or show) legal change or relation. There is admittedly some evidence to support the latter proposition. For instance, a medieval French manuscript relates that in the year 981, during the negotiations between the German emperor Otto II and Hugh Capet of France, Otto intentionally left his sword on a chair and asked Hugh to pick it up. A French bishop, fearing that Hugh would thereby be legally transmuted into Otto's swordbearer (i.e. feudal subordinate), snatched it from his hand. Schmitt, 1990: 13. In this context Otto and the bishop obviously believed that the gesture was itself legally efficacious, even if Hugh did not. Note also the situation described by the republican Roman playwright Terrence in his comedy *Andria*, where a young and somewhat besotted male character considers himself married to an unlikely (indeed, illegal) partner by virtue of the fact that she put her right hand in his while the two were standing at her mother's deathbed.

My own opinion is that in these and most other historical contexts, true legal efficacy lay not in such gestures on their own, but rather in the holistic "performances" during which gestures, words and some-



HeinOnline -- 6 J. Contemp. Legal Issues 64 1995

### *E. Communal Functions*

Legal gesture can perform three functions which may broadly be termed "communal," i.e., productive of a heightened sense of individual connection to a community.

Most obviously, legal gesture can promote community by physically creating community in space. To be at all meaningful, legal gestures require witnesses to observe them. In societies with little or no experience with writing, it is important that many people witness legal gestures so that transactions will be properly and effectively remembered. The more important the transaction, the greater the number of witnesses that tend to be required, both by law and practice.[68] In the early Middle Ages, legal gestures were purposefully performed in the crowded market or in the public court. When people came together to witness gestures in these settings (as reflected in the oft-repeated documentary formulas "in the eyes of many" and "in the presence of many"),[69] the community was (re-)created.[70]

The physical re-creation of community is facilitated by the fact that legal gesture is interesting and even fun to watch (in other words, community re-creation is stimulated by community recreation). Legal gestures generally involve persons performing unusual and even potentially threatening acts. They therefore tend to bring people together even in societies which, because of writing, are less dependent on communal memory. A variety of legal gestures seem to have been at least incidentally designed to attract communal attention to themselves. In ancient Israel, for instance, a man could confirm a legal agreement by giving his sandal to another man. A modern commentator has called this "a curious custom, but at least its unusualness would mean that it attracted attention, and this probably was its object."[71] In medieval German law, the legal gesture of two parties raising their hands over their heads and pressing their palms together to indicate agreement would likely have made people stop and

---

times other media were deployed together in the presence of witnesses. See generally Hibbitts, 1992: 941-954. It would, I think, be incorrect to take the (often culminating) part for the whole, or to conclude that the necessary was sufficient. The alternative would have opened up too many possibilities for mistake and abuse not to mention comedy, recalling Terrence. This conclusion is specifically supported by Viberg in the context of ancient Hebrew oath-ceremonies: "[T]he act, together with the utterance, is what actually makes the oath function in a legal sense. In other words, the act and the utterance together accomplish the oath." Viberg, 1992: 24. See also Hillers, 1990: 360 (emphasizing the performativity of legal "ceremonies" which always included words).

68. See Carlisse, 1928: 705 (referring to witnesses "varying in number according to the value of the object whose ownership was conveyed").

69. Le Goff, 1980: 274.

70. Fichtenau, 1991: 31 ("[A]nyone who did not participate remained outside. In this way ceremony established community.").

71. Morris, 1968: 306.



HeinOnline -- 6 J. Contemp. Legal Issues 65 1995

look.[72] In our own society, so does raising one's hand to swear an oath, all the more so because of the thinly-veiled threat of assault it appears to pose to the interlocutor.

In the process of creating community in space, legal gesture also creates community in time. As conventionalized forms, legal gestures are necessarily re-enactments and re-endorsements of the past.[73] In the short term, they remind gesturors and witnesses of previous gestural performances. In the long term, they may remind those persons of some past gesture or experience that was critical in the history of the community. The bond with the past is physically reaffirmed, while direction is physically set for the future.

Saying all this does not necessarily mean that legal gesture reaffirms the communal past exactly as it was. Especially in societies with little or no experience with writing (and/or other graphic techniques), legal gestures can change subtlely over time. In the absence of physically-recorded standards, such change is largely imperceptible to people within the gestural environment. As writing and graphic recording become more common in a society, however, gestural continuity is more explicitly preserved, and changes or mistakes in the reenactment of legal gesture become more obvious to everyone. When this occurred in the late Middle Ages, the result was a harsh and even suffocating formalism that paradoxically helped to undermine legal gesture more than it helped to preserve it.[74]

Finally, legal gesture can produce community in an abstract sense not specifically related to either time or space. It does this by creating and mediating a law to which all but a very few members of a community can easily and immediately relate. Unlike writing, gesturing is something that virtually everyone does and can do. Gesturing does not take years to either learn or interpret. It is usual, simple, and comprehensible[75] to the point that it even transcends speech (making it an instrument than can bridge linguistic as well as educational gaps — a capacity that proved particularly useful in the Middle Ages, when formal law was frequently articulated in Latin or some other language that the common people could not understand). When law acquires a gestural dimension through the raising of a hand, the touching of an object or some other symbolic act,

---

72. Huebner, 1918: 495.

73. See Rappaport, 1992 (speaking in a somewhat broader, but still analogous context: "To *perform* a liturgical order . . . is perforce to *conform* to that order.").

74. See, e.g., Letts, 1933: 561 (associating the careful depiction of numerous gestures in illuminated manuscripts of the German *Sachsenspiegel* with "a rigid formalism, which in time became so tyrannical that it was unsafe to take even the simplest step in procedure without the assistance of skilled advisers."). Compare the medieval Italian experience: "Italy very early shows a tendency toward rigidity of ritual in the realm of symbolic gesture, since it was quick to employ writing in connection with these ceremonies, and what is written down is more difficult to change than what is not." Le Goff, 1980: 264.

75. At least to people within a given society, if not always to observers from outside.



HeinOnline -- 6 J. Contemp. Legal Issues 66 1995

it therefore becomes something that all people can share. By placing otherwise disparate members of a community on the same corporeal level, legal gesture gives them a common ground.

### *F. Mnemonic Functions*

Legal gesture can serve several functions which might be described as "mnemonic," i.e., functions which help to ensure the survival of legal information in the memory of the community. These functions are especially critical within (although they are hardly limited to) societies which have had little or no experience with writing.[76]

Legal gesture's most important mnemonic function is its provision of non-verbal sensory inputs which are not only mnemonically powerful in themselves, but which reinforce the mnemonic impact of verbal information accompanying a legal transaction or relationship. For instance, legal gesture generally provides participants and witnesses with a dynamic visual image. Numerous psychological studies have shown that a visual image is more memorable than a verbal declaration, and that a dynamic visual image is even more memorable than a static one.[77] In fact, the more visually-interesting or dynamic the action performed, the more mnemonically successful it tends to be. This was certainly the intuitive understanding of one Roger de Montgomery who, according to a thirteenth century French document, wanted to impress on witnesses the extent of land he had just transferred to an abbey: "[H]e threw his son Robert de Balleme, dressed in a miniver cloak, into the water, in witness and memory that the domain of the abbott and monks extended up to there."[78] It is difficult to believe that anyone ever forgot that act. Studies have also shown that recall tends to improve dramatically when visual media are added to verbal media.[79] In this context, it makes a great deal of sense to have someone perform a legal gesture over and above pronouncing a legally-significant formula. Even today, "the sight of a couple standing hand-in-hand at the altar, being joined and blessed by the priest, . . . lasts longer in imagination and memory than the [mere] wording of any ceremony, heard now and then by the congregants. . . ."[80]

---

76. "Even in the absence of a charter, memory of a transaction, if not of its exact provisions, could be preserved by illiterate participants, witnesses and neighbors and even by subsequent generations. For these people, symbolic actions . . . were . . . primary means of maintaining continuity in culture and social structure." White, 1988: 37.

77. Many of these are reviewed in Jahandarie, 1987.

78. Tabuteau, 1988: 151.

79. Woodall et al., 1985: 327 ("[G]estures produce a more elaborate memory trace and thus result in greater recall of target information than . . . no accompanying gestures."). See also Kellerman, 1992: 241-42.

80. Boswell, 1994: 206.



HeinOnline -- 6 J. Contemp. Legal Issues 67 1995

Of course, for the person making it, legal gesture is also a kinetic, literally moving experience.[81] The feeling of movement may be memorable in itself, partly because movement demands personal involvement and attention, and partly because it is physically satisfying and enjoyable. In this context, performing a legal gesture (such as raising a hand to swear an oath) enables the memory of the legal change or relation to be inscribed in the body[82] where it is not only retained, but reanimated and reinforced with every subsequent inscription.[83]

In the process of movement, many legal gestures involve or culminate in physical contact with an object or another person. Harnessing tactility to visual and kinetic action reinforces a legal gesture's mnemonic value by not only providing an additional hook from which memory can hang, but by providing a stimulus that is particularly intimate, personal, and powerful. In the eleventh century, William the Conqueror demonstrated an appreciation of these things when he somewhat facetiously suggested that driving a knife into the hand of a grantee (presumably causing outright pain) would be the most effective way to memorialize the giving of land.[84]

In addition to providing non-verbal sensory inputs for participants and witnesses to legal change and relation, legal gesture can support memory in other less obvious, perhaps more prosaic ways. For instance, we have previously seen that gesture can attract community attention to an important legal event. Attracting attention implicitly supports memory by ensuring that the record of an event will not be jeopardized by the death or forgetfulness of a few witnesses (which helps to explain the aforementioned phenomenon of having or mandating more witnesses for especially critical legal events). Legal gesture can also facilitate remembrance by what I previously described as its simplicity and comprehensibility. What is simple and comprehensible — what fits into an easily-recognizable pattern of behavior or interaction — is more likely to be remembered than what is complicated and unintelligible.[85] The relative simplicity and comprehensibility of handing over a clod of earth to represent a transfer

---

81. On gesture and movement generally, see Birdwhistell, 1970.

82. Sienaert, 1990: 95 ("Memory is the reactivation of gestures previously internalized, shaped, played in us with the co-operation of our body. And the greater the participation of our body has been in the play — the more gestures participated in the playing out of the reception at first — the better will this past impression be expressed subsequently and the more efficiently will the stored facts be released, for memories are not ideas, much less images built into us, but gestures involving the whole of the human compound.").

83. Connerton, 1989: 72 ("Our bodies keep the past in an entirely effective form in their ability to perform certain skilled actions. . . . [M]emory is sedimented, or amasses in the body. . . .").

84. Pollock et al., 1898: 87. See generally Morinis, 1985: 166 ("Intense pain can produce a 'peak experience' in the individual which has the potential to make a fundamental mark on the consciousness."). The mnemonic value of pain may also have supported the ancient and medieval practice of sealing agreements with a hand-slap as opposed to a handshake. See Hibbitts, 1992: 931-32.

85. Birdwhistell, 1970: 13 ("[W]e perceive in pattern and we remember in pattern. Only in this way are we able to incorporate our society's way of viewing and testing the universe.").



HeinOnline -- 6 J. Contemp. Legal Issues 68 1995

of land ownership or washing one's hands to dissolve a contract therefore helps to plant the memory of legal events and transactions firmly in the minds of witnesses. Simplicity and comprehensibility are especially critical for memory when witnesses are children. In the Middle Ages, children were considered useful witnesses to legal transactions because of their expected long life-spans relative to other members of the community. Most children, however, had but a limited command of complex verbal language; they were much more likely to understand, and hence remember, relatively straightforward gestures.[86]

### *G. Regulatory Functions*

Legal gesture can regulate the behavior of individuals. In other words, it can encourage or discourage certain courses of personal conduct.

In the first place, legal gesture can discourage people from entering into certain types of transactions or relations which are deemed socially undesirable.[87] Because legal gestures are necessarily public, they expose people and their behaviors to the view and judgment of a potentially large number of others. The very prospect of this public exposure, and the fact that a legal gesture physically, intimately, and inevitably associates one with a legal change or relation (contrast this with the physical and psychological distance which writing sets between contract and contractor, grant and grantor, etc.) may discourage individuals from entering into transactions which would lead to social stigma or criticism. In this context, legal gesture can be a subtle force for social conformity. Legal gesture can also contribute to conformity insofar as it is explicitly dialogic — i.e., insofar as it not only requires the presence, but the active participation of others. The more socially-undesirable a legal change or relation is, the more difficult it becomes to obtain this active participation, and hence the more difficult it becomes to either effect the change or relation and/or preserve it in the mind of the community as a whole.

Legal gesture can perform a second regulatory function by channeling the physical reactions of parties or witnesses to legal change away from dangerous acts (such as the commission of violence) which might otherwise be prompted by the loss (or another's gain) occasioned by some

---

86. For fear of even their gestural memories failing, medieval children were sometimes struck. An eleventh century Norman charter thus notes the presence at a transaction of "William, infant, son of Fulk Moirus, who in account of the memory of this thing received a blow at the altar in the sight of many." Tabuteau, 1988: 149 (quoting in translation a charter from Saint Pierre de Preaux, dated to between 1078 and 1096).

87. Holmes, 1993: 627 (referring to formalities in general as deterring "socially undesirable agreements").



HeinOnline -- 6 J. Contemp. Legal Issues 69 1995

legal change.[88] Historically, a number of legal gestures seem to have been specially fitted to this role. Under the law of the Salian Franks, for instance, a person breaking off family ties would break four staffs above his head and then cast them into the four corners of a room.[89] In early medieval France, a vassal could analogously disavow his feudal bond by throwing a stick or straw at his erstwhile lord.[90] These conventional legal gestures inevitably constrained personal behavior while still giving vent to volatile personal feelings at critical moments of truth and confrontation.

Third and finally, legal gesture can increase an individual's incentive to respect legal change after the fact. It can do this by increasing both the social benefit attached to compliance and the social cost attached to breach. When a person takes on an obligation or assumes a relation in the public and corporeal way mandated by legal gesture, society — as we have already seen — associates him with the obligation or relation in an intimate, unavoidably personal way. In the face of such association, a person's subsequent adherence to his personally-assumed obligation or promise is likely to give him a positive social reputation (e.g., in honoring his contract, he brings honor to himself). On the other hand, if a person breaches a publicly- and personally-assumed obligation, the obvious discrepancy between his original witnessed behavior and his subsequent witnessed behavior readily makes him an object of shame in the community (e.g., in disavowing his contract, he necessarily disavows himself). In this context, legal gesture functions as a social insurance policy of sorts — undertaking an obligation or relation through gesture may in fact contribute towards its fulfillment.

### *H. Psychological Functions*

Earlier in this article I described legal gesture as being potentially evidentiary of a gesturor's mental state (see *supra* "Evidentiary Functions"). But legal gesture need not be psychologically passive. Indeed, there is evidence to support the proposition that legal gesture can actually induce critical psychological changes in both gesturors and witnesses.

To begin, legal gesture helps create or support the perception that a given legal event is important. As noted previously, gesturing demands a personal investment of time and energy. Gesturors must show up and

---

88. In general, "enforced adherence to form . . . is an effectual means of curbing the passions of the litigants, of preventing tumultuous conduct. . . . [It also] acts as a check upon the premature tendency to exercise what seems natural justice. . . ." Engelmann et al., 1928: 174-175.

89. Le Goff, 1980: 268-269.

90. Ibid. at 247. See also the twelfth-century *chanson de geste* known as *Raoul de Cambrai*: in this story, an estranged vassal took "three hairs from the ermine he ha[d] on, pulling them through the links of his burnished hauberk, and hurled them at Raoul." Kay ed. and trans., 1992: vv. 2121-2135.



HeinOnline -- 6 J. Contemp. Legal Issues 70 1995

perform; witnesses must show up, watch, and perhaps perform as well. By sanctioning and requiring such socially inconvenient and sometimes even physically taxing activities, law implicitly encourages people to think that an event (such as a marriage, or the making of a will) has unusual significance for individuals and for the community at large.[91]

Legal gesture can also overcome what some anthropologists call "sales resistance"[92] to a legal transaction — the instinctive unwillingness of persons (usually witnesses or bystanders) to recognize a contract or relation which is disadvantageous to them, or which gives someone else an advantage. Legal gesture can accomplish this not-inconsiderable feat by providing an opportunity for the demonstration of actual or latent physical and material power. In medieval Europe, for instance, feudal relationships were doubtless successful in part because of the great physical and social power present or latent in the various gestures (e.g., kneeling, folding and enclosing hands) involved in investiture and homage. Those gestures necessarily affected the psyche of the witnessing community; they subtlely encouraged its members to respect what had been done, thereby ensuring the success of feudal law. In this context, legal gesture in human society may be said to share characteristics generally associated with gesture in the animal kingdom.[93] There gestures are an efficient means of, *inter alia*, establishing relation and showing dominance.[94] Elaborate movements and displays are deployed by mammals and birds to secure a mate, a nesting area, or other similar advantage. The more resistance there is or might be to an undertaking because of what is at stake, the grander, more deliberate, or more elaborate gesturing tends to be.[95] Such a use of gesture frequently enables resistance to be overcome without harmful or costly physical struggle.[96]

In the process of shaping the reaction of witnesses, legal gesture can also prompt gesturors to feel emotions that directly dispose them towards a legal exercise's ultimate end. Gesture's general power to induce emotion in its practitioners has long been recognized by the Catholic Church, and even by some prominent Protestants. The *Catholic Encyclopedia* claims that "ceremony" (which it notably defines as "an external act, gesture or movement which accompanies . . . prayers . . . and public . . . worship")

---

91. In a broader context, it has been observed that "impressive ceremonies, such as royal coronations, presidential inaugurations, wedding ceremonies [each of which involves multiple gestures] . . . visibly demonstrate the serious nature of certain promises." Holmes, 1993: 626.

92. E.g., Knight, 1993: 6.

93. See generally Kendon, 1992: 182 ("[M]any human gestures may show analogies with the displays of animals, which are interpreted by ethologists as ritualizations of acts of withdrawal, approach, aggression and so on.").

94. See generally Laughlin et al., 1979.

95. See Krebs, 1987: 169 ("By analogy with human advertising, the counterploy to sales resistance is to increase the sales pitch, to make the signal louder, more repetitive, more conspicuous, in fact to modify it in any way that will overcome the raised threshold of the reactors.").

96. Knight, 1993: 6.



HeinOnline -- 6 J. Contemp. Legal Issues 71 1995

is employed "to excite in the faithful sentiments of respect, devotion and religion."[97] In the sixteenth century, Martin Luther said of religious rites, "the inward experience follows and is effected by the outward."[98] Law appears to have taken advantage of this so-called "disciplinary" capacity of gesture[99] early on. In the medieval homage ceremony, for instance, the vassal's gestures of kneeling before the lord and then offering his lips for the lord to kiss would likely have induced feelings of subordination appropriate to the success of the new feudal relationship.

Less obviously, but perhaps even more fundamentally, legal gesture can create a feeling of empowerment in the person who executes it — a feeling that rather than being controlled by law and legal obligation, an individual controls those things. This feeling of control is directly induced by gesture's mode of obligational or relational creation — one performs a major physical maneuver which directly contributes to making one legally-bound. The fact that legal gesture is both intensively and extensively corporeal (i.e., it needs more energy and it usually involves more of the body than writing) magnifies the sense of control.[100] Through gesture, law literally becomes a part of the person.

## III. RE-MEMBERING LAW

Legal gesture emerges from the foregoing analysis as a powerful and sophisticated modality which can perform — and historically has performed — a wide range of indicative, ordinative, evidentiary, demonstrative, mnemonic, communal, regulatory, and psychological functions. If gesture is so powerful and so sophisticated, however, why has it all but vanished from the contemporary legal scene? In a writing-oriented society, our instinctive answer to this question is, "Because writing, as a legal instrumentality, is superior."

How is writing superior to gesture as a legal instrumentality? Writing is generally said to possess three critical strengths: precision, permanence, and independence from physical co-presence. Writing is a precise medium because its meaning can be almost infinitely refined through various permutations and combinations of thousands of written words. This precision, when applied to law, allows for the creation of highly sophisticated agreements and relations. Writing is also permanent, surviving exactly and *in toto* long after a contract is made, or a conveyance is done.

---

97. *3 Catholic Encyclopedia*, 1908: 538.
98. Quoted in Eire, 1986: 72.
99. See Schmitt, 1989: 130.
100. In a somewhat-analogous context, it has been suggested that "[t]he physicality of gesture . . . has a value in itself. . . . Compare conducting music with textually specifying tempo changes and emphasis. The physicality of the interaction contributes to the . . . satisfaction of the conductor." Kurtenbach et al., 1990: 312.



HeinOnline -- 6 J. Contemp. Legal Issues 72 1995

In law, this means that the terms of obligation or relation can endure unchanged and unaltered by failures of human memory. Finally, writing is meaningful in itself, altogether apart from the physical co-presence of the writer with any given reader. This enables writing to exert power across time and over long distances. In law, the independence of writing from physical co-presence permits contracts and agreements to be made between people located very far apart (e.g., in different cities or different countries) who cannot, and indeed may never, meet.

Our focus on these strengths of writing has, however, arguably distracted us from writing's weaknesses. In the first place, writing is no good at showing people the effect of their legal agreements or relations. It can describe those agreements and relations, and it can describe their consequences, but it cannot depict them (and still remain writing). To the extent that understanding may be better served by concrete depiction rather than abstract description, writing may be more likely to permit misunderstanding of a legal change or event. In the second place, writing is relatively ineffective at creating community. Of course writing can put people from different places and from different times in metaphoric touch with one another, and certain culturally-key writings (such as the Bible and the Constitution) can serve as the foundations for so-called "textual communities,"[101] but writing neither requires nor encourages people to meet or otherwise encounter each other (for, say, the purpose of concluding or witnessing a legal transaction). In the third place, writing is arguably not very good at giving individuals a sense of personal empowerment over law. Writing actually disempowers persons who cannot read and write or are uncomfortable with reading and writing. Even for the most literate members of a society, writing literally holds the law at arms length from the body, preventing it from being fully incorporated into fundamental personal experience.

But these weaknesses of writing are the very strengths of gesture. As we have seen, legal gesture demonstrates legal meaning and thereby promotes informed choice and consent. It creates inclusive communities in space and in time. It is an intimate, inevitably corporeal medium that gives ordinary individuals a sense that they literally make the law, that it is truly theirs.

Perhaps one reason (apart from overplayed "tradition") why gesture survives on the margins of modern law is because, even in the face of writing, these and other capacities of gesture are still important to us. Perhaps we shake hands on a contract because we need to create and to publicly manifest a solidarity with another person that transcends words. Perhaps, in marriage, we exchange wedding rings and clasp hands in order to express and release emotions necessarily incidental to (and indeed

101. See generally Stock, 1983: 88-240.



HeinOnline -- 6 J. Contemp. Legal Issues 73 1995

supportive of) the occasion. Perhaps we manually hand over deeds to complete a conveyance so that we may, in an intimate, bodily sense, share in and endorse the transfer of a primary form of wealth — or perhaps, when the stakes are so high, we feel the need to demonstrate our intent to transfer in the most overt and unambiguous way.

Recognizing that gesture is not inherently inferior to writing, but rather that it has different functional strengths, may give us a new perspective on its role in the legal past as well as in the legal present. In the late classical world and again in the early modern period, gesture arguably gave way to writing as a legal instrumentality not because it was "primitive," but because it performed functions that society no longer valued as much as it once had.[102] For instance, as a modality, legal gesture supports community, but this was surely less significant in Hellenistic and post-medieval European civilizations which put a greater emphasis on individualism and privacy. Legal gesture makes legal transactions memorable, but memorability was less critical in late ancient and early modern cultures that could readily preserve even the most unmemorable transactions on parchment or paper. Legal gesture performs several regulatory functions, but these were seemingly superfluous in societies which by the first century B.C. and the sixteenth century A.D.[103] had generated centralized state structures commanding powerful physical sanctions and deterrents. Legal gesture deliberately harnesses the mind to the body, but such harnessing was problematic in a Europe which first learned to distrust the body under the tutelage of early Christian asceticism, and then in the seventeenth century segregated and further denigrated it under the influence of formal Cartesian philosophy. In these environments, legal gesture could be, and was, readily marginalized.

This analysis of legal gesture's place in the past has definite implications for its place in the future. There are many indications that "modernism" is collapsing — that we are turning away from the individualist, abstract, and ethereal (some would say generally "alienating") values of the post-Enlightenment era. There is a new longing for community, concreteness, and embodiment. In this context, writing's weaknesses as a legal instrumentality are becoming more manifest, even (or perhaps especially) as an increasing number of legal scholars use writing to directly and indirectly plead for the new normative agenda. By the same token, gesture's strengths are becoming increasingly important and relevant, all the more so because video and computer technology has lately intervened in favor of gesture by making it readily recordable, transmissible, and (in virtual reality) simulable. As a result, gesture, like writing,

---

102. This is not to suggest, however, that society's embrace of new values or its development of new capacities in these historical contexts was completely unrelated to the spread of writing. See generally Katsh, 1989; Olson, 1994; Ong, 1982.

103. See Meyer, 1988; Eire, 1986; Bremmer et al., 1991.



HeinOnline -- 6 J. Contemp. Legal Issues 74 1995

has become potentially permanent and independent of physical co-presence.[104]

Ideologically and technologically, therefore, legal gesture stands ready for a revival. Here I am not suggesting that it will (or that it should) replace writing as a legal instrumentality. I am simply saying that given our changing cultural priorities and our new technical abilities it may prove useful and convenient for us to supplement our everyday legal transactions (the making of contracts, the making of wills, the transfer of land, etc.) with more legal gestures, and to make more legally binding the gestures that now informally supplement and evidence written law — just as, in later antiquity and in the late Middle Ages, it proved culturally useful and technically convenient to supplement legal gesture with more legal writing and to make more legally binding the writing that then supplemented and evidenced legal performances.[105] In light of what I have said in this Article, I do not think that the former development should necessarily be feared.[106] Indeed, I think we should consider using legal gesture pro-actively to create a more communal, more concrete, more corporeal, and ultimately more compelling legal future for ourselves.[107] In the end, we may find that one of the best ways to reform law is to re-member it.

---

104. It might be argued that by allowing gestural communication to take place outside of a literal face-to-face environment, these developments potentially reduce legal gesture's capacity to create community. While this may be true (indicating, *inter alia*, that the new technology is hardly a social or legal panacea, and may even create new problems by complicating the relationship between the "perceived" and the "real"), it may still be said that even recorded, transmitted, or (in virtual reality) electronically-simulated gestures performed by individuals before electronically-present witnesses induce feelings of communal participation and accountability more readily than does writing (recall, for instance, the tendency of the contemporary television audience to instinctively relate to — i.e., experience "community" with — an embodied television personality or character despite the absence of any direct physical contact).

105. This does not mean that the legal gestures of the future will necessarily be the same as the legal gestures of the past. In decades to come, technologies such as virtual reality may in fact enable us to perform legal gestures in a computer-generated, mutually-inclusive cyberspace that would have been physically impossible and perhaps even inconceivable in a "live" environment. If anything, this should make legal gesture more versatile than ever. For a brief discussion of the revolutionary implications of virtual reality for the future of law (and, potentially, of legal gesture), see Pruitt et al., 1991: 405 ("Jargon-loaded and abstract documents will transform, becoming dynamic actors in cyberspace. For example, contracts will be a composite cyberspace object that the reader can step inside of and in which he can visit precise interactive objects that simulate the product or service that is being contracted.").

106. Lepow, 1992: 123 ("Historically, our society fears visual [i.e. imagistic/gestural] expression.").

107. Recalling the role of the original Reformation in marginalizing gesture in favor of writing (see Eire, 1986; Bremmer et al. eds., 1991), what I am proposing here is something of a legal Counter-Reformation that might eventually restore the body to a more central position in law's text. Realistically, however, I hardly expect this proposal to be enthusiastically embraced by contemporary legal scholars who are wary even of placing greater formal reliance on oral speech which, as language, is more directly elaborative of (and hence less challenging to) the written word than is gesture. On this latter wariness, see, e.g., Collins et al., 1990: 1119: "[W]e find it curious that the new critics of legal studies devote such great attention to the interpretation of texts. Although purporting to represent [in writing] the cause of the 'new voices' or 'other voices' they seem deaf to the oral. Put differently, is not the real problem . . . more one of . . . format than . . . content?"



HeinOnline -- 6 J. Contemp. Legal Issues 75 1995

## REFERENCES


J. Ainsworth, 1993, "In a Different Register: The Pragmatics of Powerlessness in Police Interrogation," *Yale Law Journal* 103: 259-322

K. von Amira, 1902-26, *Die Dresdener Bilderhandschrift des Sachsenspiegals,* Leipzig: K.W. Hiersemann

M. Ball, 1975, "The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater," *Stanford Law Review* 28: 81-115

J. Barkai, 1990, "Nonverbal Communication from the Other Side: Speaking Body Language," *San Diego Law Review* 27: 101-125

B. Bauml and F. Bauml, 1975, *A Dictionary of Gestures*, Metuchen, NJ: Scarecrow Press

M. Berman, 1989, *Coming to Our Senses: Body and Spirit in the Hidden History of the West*, London: Unwin Paper backs

G. Beyer, 1988, "The Will Execution Ceremony: History, Significance and Strategies," *South Texas Law Review* 29: 413-444

R. Birdwhistell, 1970, *Kinesics and Context: Essays on Body Motion Communication*, Philadelphia: University of Pennsylvania Press

J. Boswell, 1994, *Same-Sex Unions in Premodern Europe*, New York: Villiard Books

H. Bracton, 1977, S. Thorne trans., *2 On the Laws and Customs of England*, Cambridge, MA: Harvard University Press

J. Bremmer and H. Roodenburg eds., 1991, *A Cultural History of Gesture*, Ithaca, NY: Cornell University Press

C. Carlisse, 1928, L. Register trans., *A History of Italian Law*, Boston: Little, Brown and Company

E. Carpenter, 1960, "The New Languages," in E. Carpenter and M. McLuhan eds., *Explorations in Communication: An Anthology* 162-179, Boston: Beacon Press

M. Chassan, 1847, *Essai sur la Symbolique du Droit*, Paris: Videcoq Fils Aine

M. Clanchy, 1979, *From Memory to Written Record: England 1066-1307*, Cambridge, MA: Harvard University Press

R. Collins and D. Skover, 1990, "The First Amendment in an Age of Paratroopers," *Texas Law Review* 68: 1087-1127

R. Collins and D. Skover, 1992, "Paratexts," *Stanford Law Review* 44: 509-552

J. Conley and W. O'Barr, 1990, *Rules Versus Relationships: The Ethnography of Legal Discourse*, Chicago: University of Chicago Press

P. Connerton, 1989, *How Societies Remember*, New York: Cambridge University Press

C. Craver, 1993, *Effective Legal Negotiation and Settlement*, Charlottesville, VA: The Michie Company

A. Damasio, 1994, *Descartes' Error: Emotion, Reason and the Human Brain*, New York: G.P. Putnam's Sons




HeinOnline -- 6 J. Contemp. Legal Issues 76 1995

B. Danet and B. Bogoch, 1992, "From Oral Ceremony to Written Document: The Transitional Language of Anglo-Saxon Wills," *Language and Communication* 12: 95-122

G. Davies, 1985, "The Significance of the Handshake Motif in Classical Funerary Art," *American Journal of Archaeology* 89: 627-640

F. DeCoste, 1990, "Retrieving Positivism: Law as Bibliolatry," *Dalhousie Law Journal* 13: 55-84

R. Descartes, 1992, G. Heffernan trans., *Meditations on First Philosophy*, Notre Dame: University of Notre Dame Press

C. Eire, 1986, *War Against the Idols: The Reformation of Worship from Erasmus to Calvin*, Cambridge: Cambridge University Press

N. Elias, 1978, K. Tephcott trans., *The History of Manners*, New York: Panthean Press

A. Engelmann et al., 1928, R. Millar trans., *A History of Continental Civil Procedure* Boston: Little, Brown and Company

M. Featherstone, 1990, "The Body in Consumer Culture," in M. Featherstone et al. eds., *The Body: Social Process and Cultural Theory* 170-196, London; Sage

P. Feyereisen and J. de Lannoy, 1991, *Gestures and Speech: Psychological Investigations*, Cambridge: Cambridge University Press

H. Fichtenau, 1991, P. Geary trans., *Living in the Tenth Century: Mentalities and Social Orders* Chicago: University of Chicago Press

L. Fuller, 1941, "Consideration and Form," *Columbia Law Review* 41: 799-824

Gaius, 1946, F. de Zuleta trans., *1 The Institutes of Gains*, Oxford: Clarendon Press

H. Gardner, 1983, *Frames of Mind: The Theory of Multiple Intelligences*, New York: Basic Books

A. van Gennep, 1960, M. Vizedom and G. Caffe trans., *The Rites of Passage* London: Routledge & Paul

A. Gill, 1988, "The Oral Tradition of Gerry Spence in *Pring v. Penthouse*," *Southwestern University Law Review* 17: 693-706

W. Gilmore, 1989, *Reading Becomes a Necessity of Life: Material and Cultural Life in Rural New England, 1780-1835*, Knoxville, TN: University of Tennessee Press

E. Gombrich, 1982, *The Image and the Eye*, Ithaca, NY: Cornell University Press

P. Goodrich, 1988, "Modalities of Annunciation: An Introduction to Courtroom Speech," in R. Kevelson ed., *2 Law and Semiotics*, 143-165, New York: Plenum Press

C. Goodwin, 1994, "Professional Vision," *American Anthropologist* 96: 606-633

J. Goody, 1986, *The Logic of Writing and the Organization of Society*, New York: Cambridge University Press



HeinOnline -- 6 J. Contemp. Legal Issues 77 1995

J. Healy, 1990, *Endangered Minds: Why Our Children Don't Think*, New York: Simon and Schuster
B. Hibbitts, 1992, "'Coming to Our Senses': Communication and Legal Expression in Performance Cultures," *Emory Law Journal* 41: 873-960
B. Hibbitts, 1995, "Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse," *Cardozo Law Review* 16: 229-356
D. Hillers, 1990, "Rite: Ceremonies of Law and Treaty in the Ancient Near East," in E. Firmage et al. eds., *Religion and Law: Biblical-Judaic and Islamic Perspectives* 351-364, Winona Lake: Eisenbrauns
E. Holmes, 1993, "Stature and Status of a Promise Under Seal as a Legal Formality," *Willamette Law Review* 29: 617-668
R. Houston, 1988, *Literacy in Early Modern Europe: Culture and Education 1500-1800*, New York: Longman
R. Huebner, 1918, F. Philbrick trans., *A History of German Private Law* Boston: Little Brown and Company
D. Hume, 1888, *A Treatise on Human Nature*, Oxford: Clarendon Press
K. Jahandarie, 1987, "The Modality Effect," unpublished Ph.D. dissertation, Stanford University
K. Jones, 1991, "House of Justice: Feminism in Architecture," *Yale Journal of Law and Feminism* 3: 281-298
M. Katsh, 1989, *The Electronic Media and the Transformation of Law*, New York: Oxford University Press
S. Kay ed. and trans., 1992, *Raoul de Cambrai*, New York: Oxford University Press
S. Kellerman, 1992, "'I See What You Mean': The Role of Kinesic Behaviour in Listening and Implications for Foreign and Second Language Learning," *Applied Linguistics* 13: 239-258
A. Kendon, 1985, "Some Uses of Gesture," in D. Tannen and M. Saville-Troike eds., *Perspectives on Silence* 215-234, Norwood NJ: Ablex
A. Kendon, 1990, "Gesticulation, Quotable Language and Signs," in M. Moerman and M. Nomura eds., *Culture Embodied*, Osaka: National Museum of Ethnology
A. Kendon, 1992, "Gesture," in R. Bauman ed., *Folklore, Cultural Performances and Popular Entertainments* 179-190, New York: Oxford University Press
A. Kilmer, 1974, "Symbolic Gestures in Akkadian Contracts from Alalakh and Ugarit," *Journal of the American Oriental Society* 94: 177-183
C. Knight, 1993, "Ritual and the Origins of Language," paper presented at Law and Systems Research Institute workshop, Ann Arbor, MI, December 1993
G. Kocher, 1981, "Sachsenspiegel, Institutionen, Digesten, Codex: Zum Aussagewert Mittelalterlicher Rechtsillustrationen," *Forschungen zur Rechtsarchäologie und Rechtlichen Volkskunde* 3: 5-34



HeinOnline -- 6 J. Contemp. Legal Issues 78 1995

G. Kocher, 1992, *Zeichen und Symbole des Rechts*, Munich: Verlag C.H. Beck
K. Koman, 1994, "Squash It!," Harvard Magazine 97: 12-13
G. Koziol, 1992, *Begging Pardon and Favor: Ritual and Political Order in Early Medieval France*, Ithaca, NY: Cornell University Press
J. Krebs, 1987, "The Evolution of Animal Signals," in C. Blakemore and S. Greenfield eds., *Mindwaves: Thoughts on Intelligence, Identity and Consciousness* 163-174, Oxford: Basil Bleckwell
P. Kruger, 1988, "The Symbolic Significance of the *Hem* (*Kanaf*) in *1 Samuel* 15:27," *Journal for the Study of the Old Testament (Supplement Series)* 48: 105-116
G. Kurtenbach and E. Hulteen, 1990, "Gestures in Human-Computer Communication," in B. Laurel ed., *The Art of Human-Computer Interface Design* 309-317 Reading, MA: Addison-Wesley
C. Laughlin and J. McManus, 1979, "Mammalian Ritual," in E. d'Aquili et al. eds., *The Spectrum of Ritual: A Biogenetic Structural Analysis* 80-116, New York: Columbia University Press
B. Laurel, 1993, *Computers as Theatre*, Reading, MA: Addison-Wesley
J. Le Goff, 1980, A. Goldhammer trans., *Time, Work, and Culture in the Middle Ages*, Chicago: University of Chicago Press
C. Lepow, 1992, "Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education," *University of Michigan Journal of Law Reform* 26: 69-124
M. Letts, 1933, "The *Sachsenspiegel* and Its Illustrators," *Law Quarterly Review* 49: 555-574
E. Levy, 1951, *West Roman Vulgar Law: The Law of Property*, Philadelphia: American Philosophical Society
Livy, 1965, A. de Selincourt trans., *The War with Hannibal*, Harmondsworth: Penguin Books
J. Major, 1987, "'Bastard' Feudalism and the Kiss: Changing Social Mores in Late Medieval and Early Modern France," *Journal of Interdisciplinary History* 17: 509-535
M. Malul, 1983, "Studies in Legal Symbolic Acts in Mesopotamian Law," unpublished Ph.D. dissertation, University of Pennsylvania
M. Malul, 1985, "More on *Pahad Yishaq* (*Genesis* XXXI 42, 53) and the Oath by the Thigh," *Vetus Testamentum* 35: 192-200
M. Malul, 1987, "Touching the Sexual Organs as an Oath Ceremony in an Akkadian Letter," *Vetus Testamentum* 37: 491-2
D. McNeill, 1992, *Hand and Mind: What Gestures Reveal About Thought*, Chicago: University of Chicago Press
A. Melnikas, 1975, *The Corpus of the Miniatures in the Manuscripts of Decretum Gratianii*, Rome: Institute Gratianum
E. Meyer, 1988, "Literacy, Literate Practice and the Law in the Roman Empire, A.D. 100-600," unpublished Ph.D. dissertation, Yale University



HeinOnline -- 6 J. Contemp. Legal Issues 79 1995

A. Morinis, 1985, "The Ritual Experience: Pain and the Transformation of Consciousness in Ordeals of Initiation," *Ethos* 13: 150-174
L. Morris, 1968, "Ruth: An Introduction and Commentary," in A. Cundall ed., *Judges/Ruth* 306, London: The Tyndale Press
G. Mueller, 1955, "Tort, Crime and the Primitive," *Journal of Criminal Law, Criminology and Police Science* 46: 303-332
D. Olson, 1994, *The World on Paper: The Conceptual and Cognitive Implications of Writing and Reading*, New York: Cambridge University Press
W. Ong, 1982, *Orality and Literacy: The Technologizing of the Word*, New York: Methuen
R. Pittman, 1990, "We're Talking the Wrong Language to 'TV Babies'," *New York Times*, January 24, 1990: A23
F. Pollock and F. Maitland, 1898, *2 The History of English Law*, Cambridge: Cambridge University Press
S. Pruitt and T. Barrett, 1991, "Corporate Virtual Workspace," in M. Benedickt ed., *Cyberspace: First Steps* 383-409, Cambridge, MA: MIT Press
R. Rappaport, 1992, "Ritual," in R. Bauman ed., *Folklore, Cultural Performances and Popular Entertainments* 249-260, New York: Oxford University Press
T. Rivers trans., 1977, *Laws of the Alamans and Bavarians*, Philadelphia: University of Pennsylvania Press
R. Romanyshyn, 1994, "The Dream Body in Cyberspace," *Psychological Perspectives* 29: 90-103
L. Rosen, 1985, "Intentionality and the Concept of the Persan," in J. Pennock and J. Chapman eds., *Criminal Justice* 52-77, New York: New York University Press
A. Sarat and W. Feistiner, 1989, "Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office," *Yale Law Journal* 98: 1663-1688
F. Sayre, 1932, "Mens Rea," *Harvard Law Review* 45: 974-1026
J.C. Schmitt, 1989, "The Ethics of Gesture," in M. Feher ed., *Fragments for a History of the Human Body* 129-147, New York: Zone
J.C. Schmitt, 1990, *La Raison des Gestes dans l'Occident Medieval*, Paris: Gallimard
E. Sienaert, 1990, "Marcel Jousse: The Oral Style and the Anthropology of Gesture," *Oral Tradition* 5: 91-106
C. Sittl, 1890, *Die Gebarden der Griechen und Romer*, Leipzig: B. G. Teubner
E. Speiser, 1955, "I Know Not the Day of My Death," *Journal of Biblical Literature* 74: 252-56
D. Steiner, 1994, *The Tyrant's Writ: Myths and Images of Writing in Ancient Greece*, Princeton, NJ: Princeton University Press



HeinOnline -- 6 J. Contemp. Legal Issues 80 1995

B. Stock, 1983, *The Implications of Literacy: Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries*, Princeton: Princeton University Press

E. Tabuteau, 1988, *Transfers of Property in Eleventh-Century Norman Law*, Chapel Hill, NC: University of North Carolina Press

K. Thomas, 1991, "Introduction," in J. Bremmer and H. Roodenburg eds., *A Cultural History of Gesture* 1-14, Ithaca, NY: Cornell University Press

P. Tiersma, 1988, "Rites of Passage: Legal Ritual in Roman Law and Anthropological Analogues," *Journal of Legal History* 9: 3-25

A. Viberg, 1992, *Symbols of Law: A Contextual Analysis of Legal Symbolic Acts in the Old Testament*, Stockholm: Almquist and Wiksell International

A. Watson, 1993, *International Law in Archaic Rome: War and Religion*, Baltimore: John Hopkins University Press

S. White, 1988, *Custom, Kinship, and Gifts to Saints: The Laudatio Parentum in Western France, 1050-1150*, Chapel Hill, NC: University of North Carolina Press

G. Williams, 1958, "Some Aspects of Roman Marriage Ceremonies and Ideals," *Journal of Roman Studies* 48: 16-29

W. Woodall and J. Folger, 1985, "Nonverbal Cue Context and Episodic Memory: On the Availability and Endurance of Nonverbal Behaviors as Retrieval Cues," *Communication Monographs* 52: 319-333

D. Wright, 1986, "The Gesture of Hand Placement in the Hebrew Bible and in Hittite Literature," *Journal of the American Oriental Society* 106: 433-446



HeinOnline -- 6 J. Contemp. Legal Issues 81 1995

HeinOnline -- 6 J. Contemp. Legal Issues 82 1995